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2
3 **Sate of Washington**
4 **GROWTH MANAGEMENT HEARINGS BOARD**
5 **FOR EASTERN WASHINGTON**

6 **Case No. 03-1-0006c**

7 **THIRD ORDER ON COMPLIANCE**

8 LOON LAKE PROPERTY OWNERS
9 ASSOCIATION, LOON LAKE DEFENSE
10 FUND, WILLIAM SHAWL, and JANICE
11 SHAWL, LARSON BEACH NEIGHBORS, and
12 JEANIE WAGENMAN

13 Petitioner,

14 DEPARTMENT OF ECOLOGY,

15 Intervenor,

16 v.

17 STEVENS COUNTY,

18 Respondent.

19 **I. SUMMARY OF DECISION**

20 The Eastern Washington Growth Management Hearings Board (Board), in its Order
21 on Compliance issued on October 15, 2004, determined that Stevens County, the
22 Respondent, had not responded to nominations to designate Habitat and Species of Local
23 Importance and found the County out of compliance on this issue.

24 The Petitioners presented Best Available Science (BAS) supporting nominations for
25 Habitat (wetlands on Loon Lake) and Species of Local Importance (Red-necked Grebe and
26 Common Loon). After several public hearings, the Stevens County Commissioners adopted
Findings of Fact (Resolution #41-2005) denying the requests received to designate the

1 wetlands habitat at Loon Lake and two species, the Common Loon and Red-necked Grebe,
2 as Habitat and Species of Local Importance.

3 The Board found the actions taken by Stevens County to be clearly erroneous and
4 issued its Second Order on Compliance remanding Resolution 41-2005 back to Stevens
5 County to reconsider the nominations. In addition, the Board requested the County to
6 include best available science as required by the GMA and to show its work as to how they
7 it arrived at its decision using such science.

8 The Respondent filed a motion for reconsideration. The Board, in its Amended
9 Second Order on Compliance Regarding Motion For Reconsideration issued on June 2, 2005,
10 determined that the Petitioners had carried their burden of proof and had shown that the
11 actions of Stevens County were clearly erroneous by failing to identify and protect the
12 nominated habitat at Loon Lake as a Habitat of Local Importance and the Red-necked
13 Grebe as a Species of Local Importance as required by the GMA. The Board found the
14 record, including Best Available Science (BAS), as required by RCW 36.70A.172(1), and
15 other factors, overwhelmingly supported the Petitioners' nomination of the Loon Lake
16 wetlands as a Habitat of Local Importance and the Red-necked Grebe as a Species of Local
17 Importance.

18 However, the Board determined after further review that the record supported the
19 County's denial of the Common Loon as a Species of Local Importance, citing a lack of
20 evidence from the Petitioners supporting the inclusion of the Common Loon as a Species of
21 Local Importance.

22 The Board found Stevens County in continued non-compliance for its failure to
23 protect Fish and Wildlife Habitat Critical Areas (FWHCA) as required by the GMA RCW
24 36.70A.060(2) and to respond adequately to the nomination of certain species and habitat,
25 specifically the Red-necked Grebe and wetland habitat at Loon Lake.

26 Stevens County, upon receiving the notice of non-compliance from the Board, hired
Mr. Towey of Towey Ecological Services to summarize the best available science regarding
the designation of the Red-necked Grebe as a Species of Local Importance and the

1 designation of wetlands at Loon Lake as Habitat of Local Importance and make a
2 recommendation based on his observations. Mr. Towey recommended denial of both
3 designations.

4 Stevens County, after public input, passed Resolution 109-2005 on October 4, 2005,
5 denying the requests to designate Habitat and Species of Local Importance and provided
6 Findings of Fact to that effect.

7 The Board thoroughly examined all documents found in the Towey Report, upon
8 which Stevens County primarily based its decision to deny the nominations of the Red-
9 necked Grebe as a Species of Local Importance and the Loon Lake wetlands as Habitat of
10 Local Importance. The Board finds that such Report lacks the credible scientific evidence
11 needed to overcome the overwhelming scientific information and best available science in
12 the record provided by the Petitioners.

13 The Board has determined that the Petitioners have carried their burden of proof.
14 The Board finds Stevens County to be in continued non-compliance for its failure to protect
15 Fish and Wildlife Habitat Critical Areas (FWHCA) as required by the GMA RCW
16 36.70A.060(2) and its failure to respond appropriately in light of the record to the
17 nomination of Habitat and Species of Local Importance, specifically the wetland habitat at
18 Loon Lake and the Red-necked Grebe.

19 **II. PROCEDURAL BACKGROUND**

20 On February 2, 2004, the Board issued an Order consolidating EWGMHB Case Nos.
21 00-1-0016, 03-1-0003 and 03-1-0006 under new Case No. 03-1-0006c.

22 On February 10, 2004, the Board issued its Final Decision and Order in Case No. 03-
23 1-0003.

24 On March 17, 2004, the Board refused to reconsider its order or issue an Amended
25 Final Decision and Order.

26 On May 17, 2004, the Board received Respondent, Stevens County's Motion to
Extend Time requesting an additional 30 days to bring themselves into compliance with the

1 Board's Final Decision and Order dated February 10, 2004. Stevens County was to be in
2 compliance by June 9, 2004.

3 On October 15, 2004, the Board issued its Order on Compliance.

4 On November 17, 2004, the Board received a Motion to Extend Time and Affidavit of
5 Peter G. Scott in Support of Motion to Extend Time requesting an additional 45 days to
6 bring themselves into compliance.

7 On November 22, 2004, the Board asked that any objections to such continuance be
8 filed with the Board by December 3, 2004. The Petitioners LLPOA and Larson Beach
9 Neighbors and Jeanie Wagenman notified the Board that they do not object to the
10 additional 45 days.

11 On December 14, 2004, the Board issued its Order on Motion to Extend Time.

12 On February 11, 2005, the Board received a request for Compliance Hearing from
13 Petitioners' in the above matter.

14 On February 15, 2005, the Board issued its Order Setting Compliance Hearing and
15 Briefing Schedule.

16 On March 14, 2005, the Board received a request from Petitioner Jeanie Wagenman
17 asking for additional time to file Petitioner's Compliance Brief because materials pertinent to
18 briefing were unavailable.

19 On March 15, 2005, the Board received a letter from Respondent's attorney Peter
20 Scott, advising the Resolution of the Decision would be available to Petitioner on March 22,
21 2005.

22 On April 14, 2005, the Board held a telephonic compliance hearing. Present were
23 Presiding Officer, John Roskelley, and Board Members Judy Wall and Dennis Dellwo. Present
24 for Petitioners were Jeanie Wagenman, Mr. and Mrs. Shawl, and Bruce Erickson. Present for
25 Respondent were Peter Scott and Lloyd Nickel.

26 On May 20, 2005, the County filed a Motion to Reconsider. On May 25, 2005, the
Board received a response to the Motion for Reconsideration from Petitioner Jeannie
Wagenman.

1 On June 2, 2005, the Board issued its Amended Second Order on Compliance
2 Regarding Motion for Reconsideration.

3 On August 4, 2005, the Board received Respondent's Motion to Extend Scheduling
4 Deadline and Affidavit of Peter Scott in Support of Motion.

5 On August 8, 2005, the Board received a letter from Petitioners regarding the Motion
6 to Extend Scheduling Deadline.

7 On August 9, 2005, the Board issued its Order Setting Compliance Hearing and
8 Briefing Schedule.

9 On September 9, 2005, the Board received Respondent's Status Report and Motion
10 to Extend Legislative Action Deadline to September 27, 2005.

11 On September 29, 2005, the Board received Respondent's Statement of Action Taken
12 to Comply.

13 On October 3, 2005, the Board received Petitioners' Motion to Extend Briefing Time
14 for Petitioners.

15 On October 6, 2005, the Board received Stevens County's Response to Motion to
16 Extend Briefing Time for Petitioners and Supplemental Statement of Action Taken to
17 Comply.

18 On October 11, 2005, the Board issued its Order Extending Compliance Hearing and
19 Briefing Schedule.

20 On October 20, 2005, the Board received Petitioners' Third Compliance Hearing HSLI,
21 Petitioners LBN Brief.

22 On November 3, 2005, the Board received Respondent's Third Compliance Hearing
23 Brief, Affidavit of Peter Scott in Support of Respondent's Third Compliance Hearing Brief.

24 On November 10, 2005, the Board received Petitioners' Reply Brief Third Compliance
25 Hearing.

26 On November 18, 2005, the Board held the third telephonic compliance hearing.
Present were Presiding Officer, John Roskelley, and Board Members Judy Wall and Dennis

1 Dellwo. Present for Petitioners was Jeanie Wagenman, representing Larson Beach
2 Neighbors. Present for Respondent was Peter Scott, representing Stevens County.

3 **III. STANDARD OF REVIEW**

4 Comprehensive plans and development regulations (and amendments thereto)
5 adopted pursuant to the Growth Management Act ("GMA" or "Act") are presumed valid
6 upon adoption by the local government. RCW 36.70A.320. The burden is on the Petitioners
7 to demonstrate that any action taken by the respondent jurisdiction is not in compliance
8 with the Act.

9 The Washington Supreme Court has summarized the standards for Board review of
10 local government actions under Growth Management Act. It was stated:

11 The Board is charged with adjudicating GMA compliance, and, when
12 necessary, with invalidating noncompliant comprehensive plans and
13 development regulations. RCW 36.70A.280.302. The Board "shall find
14 compliance unless it determines that the action by the state agency, county or
15 city is clearly erroneous in view of the entire record before the county, or city
16 is clearly erroneous in view of the entire record before the Board and in light
17 of the goals and requirements of [the GMA]." RCW 36.70A.320(3). To find an
18 action "clearly erroneous" the Board must be "left with the firm and definite
19 conviction that a mistake has been committed." *Dep't of Ecology v. Pub. Util.*
20 *Dist. No. 1*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993).

21 *King County v. Central Puget Sound Growth Management Hearings Board*, 142 Wn.2d 543,
22 552, 14 P.3d 133, 138 (2000).

23 The Board will grant deference to counties and cities in how they plan under Growth
24 Management Act (GMA). RCW 36.70A.3201. But, as the Court has stated, "local discretion is
25 bounded, however, by the goals and requirements of the GMA." *King County v. Central*
26 *Puget Sound Growth Management Hearings Board*, 142 Wn.2d 543, 561, 14 P.2d 133
(2000). It has been further recognized that "[c]onsistent with *King County*, and
notwithstanding the 'deference' language of RCW 36.70A.3201, the Board acts properly
when it foregoes deference to a . . . plan that is not 'consistent with the requirements and

goals of the GMA." *Thurston County v. Cooper Point Association*, 108 Wn.App. 429, 444, 31 P.3d 28 (2001).

The Board has jurisdiction over the subject matter of the Petition for Review. RCW 36.70A.280(1)(a).

IV. ISSUES PRESENTED

The Board found Stevens County's failure to designate the Red-necked Grebe as a Species of Local Importance and the Loon Lake wetlands as Habitat of Local Importance clearly erroneous, thus violating the GMA by not properly following the requirements set forth in the act. The Board found Stevens County out of compliance and remanded Resolution 41-2005 to the County to reconsider the subject nominations.

The issue is whether Stevens County has taken the appropriate legislative action to bring themselves into compliance with the goals and requirements of the GMA concerning the nominations of the Loon Lake wetlands as Habitat of Local Importance and the Red-necked Grebe as a Species of Local Importance.

V. ARGUMENT, DISCUSSION AND ANALYSIS

The Parties Positions:

Petitioners' Position:

The Petitioners, Larson Beach Neighbors and Jeanie Wagenman, et al., contend in their 3rd Compliance Hearing Brief, that the Respondent, Stevens County, failed again to properly respond to the nomination of Habitats and Species of Local Importance.

The Petitioners contend that the County hired its own expert to "simply justify the County's denial, despite what was in the record and what constituted best available science". (Petitioners' 3rd Compliance Hearing brief, 1st para., p. 30). They contend the County failed to consider and include "substantively" the BAS placed into the record by the Petitioners and its own expert, Mr. Towey, and that much of the County's reasoning is simply faulty. The Petitioners argue there is substantial evidence in the record that points to the local factors of the decline of the Red-necked Grebe, as well as the importance of Loon Lake's remaining wetlands. Petitioners detail this evidence in their brief. They also argue

1 that there is nothing in the record supporting the County's claim that the wetlands are
2 neither unique nor necessary for the Red-necked Grebe.

3 The Petitioners contend that the County's expert, Mr. Towey, did not review the
4 complete record and ignored the data submitted from the last two compliance hearings.
5 They argue that the science presented by the Petitioners' experts is "much more solid
6 expert testimony and science supporting (sic) the nomination" than Mr. Towey's report,
7 which in conclusion does not support the nominations. The Petitioners use exhibits from a
8 variety of sources to argue their case.

8 **Respondents Position:**

9 The Respondent, Stevens County, contends that the County denied the requested
10 nominations of the Red-necked Grebe, as a Species of Local Importance, and the Loon Lake
11 wetlands, as Habitat of Local Importance for three reasons: (A) the best available science in
12 the record does not support the requested designations, (B) the habitat functions and
13 values of wetlands are already adequately protected under the County's Critical Areas
14 Ordinance (Title 13 SCC) as a class of critical areas distinct from fish and wildlife habitat
15 conservation areas ("FWHCA"); and (C) the Growth Management Act does not provide for
16 the regulation of boating activities.

17 The Respondent argues in (A) in their brief that the County, under WAC 365-190-
18 080(5) is charged to ensure that species are maintained "across their natural geographic
19 distribution". The County is therefore not required to designate a Species of Local
20 Importance at any one location. Furthermore, the Respondent contends that given the
21 definition of Habitat of Local Importance, the Red-necked Grebe does not fall within the
22 three categories that would support the requested designations.

23 Under (B), the Respondent argues that the County did not designate wetlands as
24 Fish and Wildlife Habitat Conservation Areas (FWHCA). They contend Stevens County
25 protects the functions and values of wetlands under SCC 13.10.020.025 pursuant to WAC
26 365-190-080(1) and FWHCA's are designated and protected under SCC 13.10.030.034
pursuant to WAC 365-190-085(5). The Respondent argues that the Board has already ruled

1 that the protective buffers around wetlands in Stevens County adequately protect habitat
2 functions and values associated with wetlands and are, therefore, GMA compliant.

3 The Respondent in (C) contends there is no requirement in the text or context of the
4 GMA or SCC Title 13 for regulating boating activities to protect critical areas. The
5 Respondent further argues RCW 36.70A.010 applies to land only, not water. In addition, the
6 Respondent argues that RCW 36.70A.030(7) defines "development regulation", and under
7 that definition boating is neither development nor a land use activity, thus the County is
8 neither required nor authorized to regulate boating activities. They further point out that
9 boating activity at Loon Lake is not subject to any of the listed County approvals and Title
10 13 does not apply. "Because the GMA does not give the County any authority to impose the
11 management strategy demanded by the Petitioner, and it is not within the scope of Title 13
12 as required by Appendix B, the requested management strategy was properly denied."

Petitioners' Reply Brief:

13 In their reply brief, the Petitioners take each of the three issues, (A), (B) and (C)
14 presented by the Respondents, and present argument to dispute them.

15 Under (A), the Petitioners argue that the Respondents definition of "habitats", found
16 in WAC 365-190-080(5), does not mean "across their natural geographic distribution" as
17 proposed by the Respondents. According to the Petitioners, even Stevens County's own
18 Interim Critical Areas Ordinance narrows the definition of "habitats" to local areas, such as
19 Loon Lake [ICAO #75-200, Habitats of Local Importance 2.6 and Species of Local
20 Importance 2.10, which is the same as WAC 365-190-030(19) and (9)]. The Petitioners
21 argue that if the County's definition applied, "across their natural geographic distribution",
22 then the habitat and species in decline would disappear one by one in local areas
23 throughout the County before action would be necessary to save them.

24 The Petitioners contend that if the Respondent's definition of "habitats" (across its
25 natural geographical distribution) is used for wetlands, such as Loon Lake's wetlands, the
26 vital functions, which the remaining wetlands on Loon Lake provide, would be completely
gone. Essentially, for these wetlands to be "locally important" (Petitioners' quotes) they

1 would need to be in decline "across its (County's) natural geographical distribution". The
2 Petitioners argue that the County is asking the citizens to monitor species and habitat
3 throughout the entire county to determine whether a species or habitat is in decline and
4 needs protection in a local area.

5 The Petitioners ask and answer the rhetorical question, "If the County finds it
6 permissible to write off the Red-Necked Grebe on Loon Lake, what then is the County doing
7 to prevent the remaining lakes from suffering similar consequences? Nothing." According to
8 the Petitioners, the County has no adaptive management program to allow prompt
9 adjustment in regulation, if its present regulations prove inadequate. They also contend the
10 County is not monitoring the Red-necked Grebe on other lakes in Stevens County, so it can't
11 possibly know whether or not the Red-Necked Grebe is experiencing the same reproductive
12 decline as at Loon Lake.

13 The Petitioners argue that the County claims that the population of Red-necked
14 Grebes is stable "across its natural geographic distribution", but there is nothing in the
15 record to support this claim. The Petitioners contend the science they (the Petitioners)
16 provided to the record indicates nesting pairs have increased since 2000 and 2001. This is
17 because the Loon Lake Loon Association placed artificial nesting platforms in the emergent
18 wetlands in 2005. Regardless, the reproductive rate still remains extremely low due in part
19 to encroachment by motorized craft and waves from boats and jet skis in these nesting
20 areas.

21 The Petitioners argue that the Red-necked Grebe is on the Washington Department
22 of Fish and Wildlife (WDFW) "Species of Concern" list and has been since 1994. The Red-
23 necked Grebe is also considered a "vulnerable aggregation".

24 The Petitioners contend the County's expert, Mr. Towey, does not state where he
25 gets his "available" information to conclude, in reference to the Red-necked Grebe, that it
26 "appears populations are stable" (Towey report, pg. 6, HSLI exhibit 152). According to the
Petitioners, specific information was available for Loon Lake from the studies done by Mr.
Poleschook and Ms. Gumm. They also point out that Mr. Towey's resumé does not include

1 any professional experience in regards to wildlife in general or the Red-necked Grebe in
2 particular.

3 In reference to the County's claim that Red-necked Grebes are relatively tolerant of
4 habitat manipulation, the Petitioners provide four letters from experts in their field to
5 dispute the County's statement, including two from Chris Merker, Department of Ecology,
6 one from Michael Fulsom and one from Dr. Nuechterlein. These experts conclude, contrary
7 to the County's conclusion, that the "loss of the values and functions (manipulation) of
8 these emergent wetlands (degradation, alteration and destruction) will greatly impact the
9 fish and wildlife dependent upon these areas." (Petitioners Compliance Reply Brief, pg. 10).

10 The Petitioners acknowledge nesting sites were up in 2005 from years 2000 and
11 2001, specifically from pre-built and placed nesting platforms. Unfortunately, the fledging
12 rate, which determines whether a species will survive over the long term, was 19% in 2005,
13 a very low rate and, according to experts, will not sustain a breeding population of Red-
14 necked Grebes.

15 The Petitioners find fault in the County's argument that its Boating Ordinance (I-
16 1989), which requires no-wake boat speeds within 100 ft. of shore, will protect the Red-
17 necked Grebe and the remaining wetlands. The Boating Ordinance does not require boats
18 to maintain a distance from nest sites, nor does it require a no-wake zone near nest sites. It
19 only requires a no-wake zone 100 feet from the shoreline. Nests are frequently found more
20 than 100 feet from the shoreline as seen in the nesting site maps (Petitioners exhibit 12).
21 The Petitioners point out that the County's expert, Mr. Towey, recommended enhancement
22 and restoration of the shorelines/wetlands on Loon Lake to ensure the Grebe's future,
23 indicating that these wetlands are in jeopardy today.

24 In reference to the County's argument that there is no evidence that the Loon Lake
25 wetlands will be altered or that such alteration might reduce the likelihood that the Red-
26 necked Grebe will be able to maintain or reproduce over the long term, the Petitioners cite
in the record numerous examples of the County's failure to follow and/or enforce its own
Critical Areas Ordinance, shoreline regulations and development regulations. The Petitioners

1 also include photos of abuse and misuse of the shoreline, apparently ignored by the County.
2 The County concludes that the wetlands on Loon Lake are adequately protected, yet its
3 expert, Mr. Towey, suggests otherwise. He states in his report, "...it should be noted that
4 the production from man induced wave-action is not considered under Title 13".

5 Under (B), the Petitioners contend that the County's argument that wetlands are not
6 classified as FWHCA and therefore are eliminated as possible "nominations of Habitats of
7 Local Importance" is without merit. Just because the County did not classify emergent
8 wetlands or even wetlands in their CAO as FWHCA's doesn't mean wetlands can't be
9 considered for Habitats of Local Importance. The County's wetland provisions in its CAO,
10 currently missing such regulations as no-wake zones near nesting sites, do not provide the
11 necessary protections to ensure a viable population of Red-necked Grebe. The Petitioners
12 argue that the GMA has included Habitats and Species of Local Importance to provide the
13 extra protection for habitat and species not necessarily provided for by local jurisdictions in
14 their CAO.

15 Under (C), the County maintains that its Title 13 (CAO) is a GMA development
16 regulation and does not and cannot be used to regulate recreational activities such as
17 boating. The Petitioners argue that they are not attempting to regulate recreational
18 activities, but are attempting to allow for the habitat needs of the Red-necked Grebe in their
19 nesting areas during nesting season. Under GMA, functions and values of critical areas,
20 such as wetlands, need protection.

21 The Petitioners cite the Court of Appeals case, *Clallam County v. WWGMHB*, Case
22 #31283-2-II Slip Opinion (Oct. 25, 2005) to emphasize that the definition of development
23 regulations in RCW 36.70A.030 means "...counties and cities must use the best available
24 science to promulgate not just development regulations, but the policies intended to protect
25 critical areas." The Petitioners contend that the Court more broadly defined "regulation"
26 including use activities, allowing counties to put in place restrictions that protect critical
areas.

1 According to the Petitioners, it doesn't take an expert opinion to come to the
2 conclusion that the wetland habitat and Red-necked Grebe are threatened by wave action
3 from boats, as well as the "close physical presence of these boats" (Petitioners Reply Brief,
4 pg. 18) to impact nesting Grebes. The Petitioners argue that the County just needs to
5 observe what is happening on Loon Lake to come to the same conclusion as the experts.
6 They also argue that the County, in regards to the protection of the values and functions of
7 Critical Areas as they relate to the future of Loon Lake, and more specifically to wetland
8 habitats in relationship to the Red-necked Grebe, is "simply refusing to address this issue
9 (of regulation), as it relates to Habitats and Species of Local Importance" (Petitioners Reply
10 Brief, pg. 20).

Relevant Statutes:

11 The Growth Management Act provides that:

12 On or before September 1, 1991, each county, and each city, shall designate
13 where appropriate: ... (d) critical areas. RCW 36.70A.170(d).

14 In designating and protecting critical areas under this chapter
15 [36.70A.172(1)], counties and cities shall include the best available science in
16 developing policies and development regulations to protect the functions and
17 values of critical areas. In addition, WAC 365-195-905 gives cities and
18 counties criteria for determining which information is considered the "best
19 available science".

RCW 36.70A.172

**Critical areas -- Designation and protection -- Best available science
to be used.**

- 20 (1) In designating and protecting critical areas under this chapter, counties
21 and cities shall include the best available science in developing policies
22 and development regulations to protect the functions and values of
23 critical areas. In addition, counties and cities shall give special
24 consideration to conservation or protection measures necessary to
25 preserve or enhance anadromous fisheries.

**WAC 365-195-905 Criteria for determining which information is the
"best available science." (1) This section provides assessment criteria to**

1 assist counties and cities in determining whether information obtained during
2 development of critical areas policies and regulations constitutes the "best
3 available science."

4 (2) Counties and cities may use information that local, state or federal natural
5 resource agencies have determined represents the best available science
6 consistent with criteria set out in WAC [365-195-900](#) through [365-195-925](#). The
7 department will make available a list of resources that state agencies have
8 identified as meeting the criteria for best available science pursuant to this
9 chapter. Such information should be reviewed for local applicability.

10 (3) The responsibility for including the best available science in the
11 development and implementation of critical areas policies or regulations rests
12 with the legislative authority of the county or city. However, when feasible,
13 counties and cities should consult with a qualified scientific expert or team of
14 qualified scientific experts to identify scientific information, determine the best
15 available science, and assess its applicability to the relevant critical areas. The
16 scientific expert or experts may rely on their professional judgment based on
17 experience and training, but they should use the criteria set out in WAC [365-
18 195-900](#) through [365-195-925](#) and any technical guidance provided by the
19 department. Use of these criteria also should guide counties and cities that
20 lack the assistance of a qualified expert or experts, but these criteria are not
21 intended to be a substitute for an assessment and recommendation by a
22 qualified scientific expert or team of experts.

23 (4) Whether a person is a qualified scientific expert with expertise appropriate
24 to the relevant critical areas is determined by the person's professional
25 credentials and/or certification, any advanced degrees earned in the pertinent
26 scientific discipline from a recognized university, the number of years of
experience in the pertinent scientific discipline, recognized leadership in the
discipline of interest, formal training in the specific area of expertise, and field
and/or laboratory experience with evidence of the ability to produce peer-
reviewed publications or other professional literature. No one factor is
determinative in deciding whether a person is a qualified scientific expert.
Where pertinent scientific information implicates multiple scientific disciplines,
counties and cities are encouraged to consult a team of qualified scientific
experts representing the various disciplines to ensure the identification and
inclusion of the best available science.

(5) Scientific information can be produced only through a valid scientific

process. To ensure that the best available science is being included, a county or city should consider the following:

- a. Characteristics of a valid scientific process. 1. Peer Review... 2. Methods... 3. Logical conclusions and reasonable inferences... 4. Quantitative analysis... 5. Context... 6. References...
- b. Common sources of scientific information.

RCW 36.70A.060(2) provides that every county shall adopt development regulations that protect critical areas. The definition of "critical areas" includes "fish and wildlife habitat conservation areas" (FWHCA) [RCW 36.70A.030(5)(c)]. WAC 365-190-080(5)(a)(ii) provides that FWCHA include "habitats and species of local importance."

WAC 365-190-030(9) defines habitats of local importance as:

"Habitats of local importance include a seasonal range or habitat element with which a given species has a primary association, and which, if altered, may reduce the likelihood that the species will maintain and reproduce over the long-term. These might include areas of high relative density or species richness, breeding habitat, winter range, and movement corridors. These might also include habitats that are of limited availability or high vulnerability to alteration, such as cliff, talus and wetlands."

WAC 365-190-030(19) defines "species of local importance" as:

"Species of local importance are those species that are of local concern due to their population status or their sensitivity to habitat manipulation or that are game species."

Board Discussion:

As provided in the above statutes, the County is required to make a "reasoned analysis on the record, including best available science and other local factors" in determining whether or not a habitat or species should be designated as Habitat or Species of Local Importance. *Island County Citizens Growth Management Coalition v. Island County* (*supra*). The Growth Management Act requires the record to include best available science

1 in developing policies and development regulations to protect the functions and values of
2 critical areas, which Habitats and Species of Local Importance are an important part. RCW
3 36.70A.172(1).

4 Local governments must "analyze the scientific evidence and other factors in a
5 reasoned process." *Easy v. Spokane Co.*, EWGMHB #96-1-0016, 1997 WL 191457, at 6.

6 Stevens County was found out of compliance by the Board for failure to protect Fish
7 and Wildlife Habitat Critical Areas (FWHCA) as required by the GMA RCW 36.70A.060(2)
8 and to respond adequately to the nomination of certain Species and Habitat of Local
9 Importance, specifically the Red-necked Grebe and wetland habitat at Loon Lake. The
10 Board determined that the County's decision was not supported by scientific evidence,
11 especially in light of the overwhelming best available science in the record provided by the
12 Petitioners. The County was ordered to come into compliance by the Board's Amended
13 Second Order on Compliance.

14 In an effort to come into compliance, the County hired its own expert, Mr. Towey,
15 owner of Towey Ecological Services, to review the BAS and make a recommendation
16 concerning the nominations for Habitat and Species of Local Importance. Mr. Towey's
17 report recommended a denial of the nominations of the wetlands at Loon Lake as Habitat of
18 Local Importance and the Red-necked Grebe as a Species of Local Importance.

19 Case law has made it perfectly clear that legislative bodies, such as counties and
20 cities, must substantially consider best available science to support its findings concerning
21 the nominations of Habitat of Local Importance and/or Species of Local Importance. In
22 addition, a local jurisdiction is not constrained to adopt only the science recognized by state
23 or federal agencies, but a variation from formally identified BAS must be supported in the
24 record by evidence that also meets the BAS standard (see WAC 365-195-905).

25 "The science the legislative body relies on must in fact be the best available
26 science to support its policy decisions. Under the cases and statutes cited
above, it cannot ignore the best available science in favor of the science it
prefers simply because the latter supports the decision it wants to make." *Id.*,
96 Wn.App. at 534, 979 P.2d at 871.

1 Legislative bodies must also be cautious about using their own science just to
2 support their own agenda:

3 "Under *Heal v. CPSGMHB*, Court of Appeals, Cause #40939-1-1 (June 21,
4 1999), the County cannot choose its own science over all other science and
5 cannot use outdated science to support its choice." *Island Co. Citizens' Growth*
6 *Management Coalition, et al, v. Island County, et al*, WWGMHB Case #98-2-
0023c, Compliance Order (March 6, 2000).

7 The role of the BAS standard has been interpreted by the courts to require more
8 than mere "consideration" of science. BAS must substantively control the standard
9 established and must be reflected in the record:

10 "Whether scientific evidence is respectable and authoritative, challenged or
11 unchallenged, controlling or of no consequence when balanced against other
12 factors, goals and evidence to be considered, it's first in the province of the
13 city or county to decide. Then, if challenged, it is for the Growth Management
14 Hearings Board to review. The Legislature has given great deference to the
15 substantive outcome of that balancing process. We hold that evidence of the
16 best available science must be included in the record and must be considered
17 substantively in the development of critical areas policies and regulations."
18 *HEAL v. Central Puget Sound Growth Management Hearings Board*; 96
19 Wn.App. 522, 979 P.2d 864 at 870, (Wash.App. Div 1, 1999).

20 The Board must also recognize that the qualifications of the "experts" and their
21 field(s) of expertise are important criteria in helping to determine which science is perhaps
22 better than another:

23 "The information relied on by the county does not rise to the level of scientific
24 information and, therefore, cannot possibly qualify as BAS. Although the
25 dissent emphasizes Dr. McKnight's 30 years of experience working as a wildlife
26 biologist in Alaska, nothing in Dr. McKnight's background indicates any
familiarity with the wildlife of Ferry County." *Ferry Co. v. Concerned Friends of*
Ferry Co., et al, Supreme Court Case #75493-4 (November 17, 2005).

1 The Supreme Court, in the same Ferry County case, further held that an "expert"
2 should compare their science with that of other experts, for instance state or federal
3 agencies:

4 "Nor is there sufficient evidence of the county comparing science provided by
5 Dr. McKnight to any other resources, such as science available from state or
6 federal agencies or the Colville Tribe. As the Western Washington Growth
7 Management Hearings Board correctly stated, a "(c)ounty cannot choose its
8 own science over all other science and cannot use outdated science to support
9 its choice." *Island County Citizens' Growth Mgmt. Coalition v. Island County*,
10 No. 98-2-0023c, 2000 WL 268939, at *7 (WWGMHB March 6, 2000).

11 In addition, the Board takes note from *Clark County Natural Resources Council, et al.*
12 *v. Clark County, et al.*, WWGMHB Case #96-2-0017, Compliance Order (November, 1997),
13 that science determines what habitat and species should be designated Habitat and Species
14 of Local Importance, not whether the nominated habitat or species is listed by the WDFW
15 as priority habitat and species. The Western Board held the following:

16 "In the final order in this case, we noted that the overwhelming scientific
17 evidence in the record virtually required establishment of the three FWHA's of
18 local importance that were not otherwise previously designated by DFW as
19 priority habitat and species areas."

20 **The Red-necked Grebe**

21 The Board looks to the statutes and case law to determine whether Stevens County
22 has taken the appropriate legislative action to bring itself into compliance with the Board's
23 Amended Second Order on Compliance. In that Order, the Board found that Stevens
24 County's failure to designate the Red-necked Grebe as a Species of Local Importance and
25 the Loon Lake wetlands as a Habitat of Local Importance was clearly erroneous.

26 The Petitioners throughout the County's process provided the best available science
and scientific testimony from resident and non-resident experts as to why the Red-necked
Grebe should be designated as a Species of Local Importance and the wetlands at Loon
Lake need additional protection as Habitat of Local Importance. The Petitioners followed the

1 process outlined by the County to nominate Habitats and Species of Local Importance and
2 supported their claim with overwhelming scientific evidence.

3 The Petitioners submitted expert testimony and studies from Mr. Daniel Poleschook
4 and Ms. Ginger Gumm, who provided numerous scientific studies and professional papers
5 on the Red-necked Grebe on Loon Lake and the Loon Lake wetlands; Ms. Bonnie Stout,
6 Ph.D. candidate at Simon Fraser University, considered nationally by her peers as an expert
7 on Red-necked Grebes; Dr. Gary Nuechterlein, another nationally recognized Red-necked
8 Grebe expert with many scientific research papers on grebes to his credit; Dr. Deborah
9 Buitron, a colleague of Dr. Nuechterlein at North Dakota State University and co-author of a
10 number of grebe scientific papers ; Mr. Darwin Long, a grebe and loon research biologist at
11 the Biodiversity Research Institute; Mr. Christopher Merker, biologist with the Washington
12 State Department of Ecology; Dr. Michael Folsom, a professor at Eastern Washington
13 University specializing in hydrology and wetland banking; and Mr. Allen Palmanteer,
14 Washington State Department of Fish and Wildlife area habitat biologist.

15 Each of these experts provided specific information based on science and/or personal
16 on-the-lake knowledge of the Red-necked Grebe and the Loon Lake wetlands, documenting
17 why they support either the nomination of the Red-necked Grebe as a Species of Local
18 Importance, the nomination of the Loon Lake wetlands as a Habitat of Local Importance or
19 both. The theme of the letters of support and the studies submitted was that the Red-
20 necked Grebe can not continue to inhabit Loon Lake without protection to their nesting sites
21 and that the Loon Lake wetlands merit protection to continue their many vital functions for
22 the lake, including their use as a breeding area for the Red-necked Grebe.

23 The County, upon receiving the Board's Amended Second Order on Compliance,
24 hired its own expert, Mr. William T. Towey, a certified wetland scientist with more than 13
25 years of professional experience conducting wetland and habitat assessments. His job was
26 to evaluate the evidence and best available science and determine whether the two
nominations, the Loon Lake wetlands and Red-necked Grebe, should be designated as
Habitat and Species of Local Importance. Mr. Towey reached this conclusion:

1 "It is the professional opinion of the reviewer that the analysis conducted
2 herein does not support the designation of the Red-necked Grebe as a Species
3 of Local Importance and does not support the designation of the Loon Lake
4 wetlands as Habitat of Local Importance." (Towey Ecological Services report,
5 pg. 2, August 23, 2005).

6 Mr. Towey's recommendation, according to the report's Executive Summary, is due
7 to the solitary nature of the Grebe and its likelihood to nest in calmer waters near-shore. He
8 concludes that the existing wetland buffers, the designation of Loon Lake as a water of
9 statewide significance and the County's wake restrictions are reasonable measures for the
10 Red-necked Grebes protection.

11 It should be pointed out that the County, in its Staff Report and Findings of Fact in
12 Resolution 109-2005 (Petitioners Compliance Brief, attachment 2 & 3), selected the science
13 it preferred from comment letters submitted during the public hearing process by giving
14 credence to statements that supported Mr. Towey's report and leaving out those comments
15 that supported the nominations. The most glaring examples of the County's selective
16 science is the complete omission of any comments by Chris Merker of the DOE and non-
17 selected comments in support of the nomination of the wetland habitat by Allen Palmanteer
18 of the WDFW (Petitioners Compliance Brief, attachment 18). The staff also refused to
19 accept as peer review comments from nationally recognized Red-necked Grebe experts,
20 such as Dr. Gary Nuechterlein, Dr. Deborah Buitron and Mr. Darwin Long.

21 The Board, upon evaluating the substantive scientific evidence in the record from
22 local experts, nationally distinguished scientists, Washington State agency personnel and
23 the Towey Report, finds that Mr. Towey's final recommendation is not supported by the
24 Best Available Science.

25 Mr. Towey's report is a compilation of selected information gleaned from one
26 publication on wetland plants, three websites, several letters, the Stevens County Critical
Areas Ordinance and some of the record, but evidently not all. His statements are

1 generalized and some conclusions are undocumented assumptions and premonitions, such
2 as the following:

3 "Due to the high protection afforded the emergent wetland habitats at Loon
4 Lake, it is probable that the remaining habitat will remain intact as long as
regulations are enforced." (Board emphasis).

5 "As such, it is likely that the Red-necked Grebe has many opportunities to find
6 suitable nesting conditions. This will likely ensure future persistence of the
7 species."

8 Mr. Towey fails to acknowledge key scientific information in the record submitted by
9 the Petitioners, such as the detailed nesting and fledging study, and his final
10 recommendation ignores the imminent and immediate peril facing the Red-necked Grebe
11 and the wetlands in Loon Lake. He does, however, acknowledge that the lake has lost most
12 of its original wetlands to development and "Loon Lake does not have the highest available
13 Grebe habitat for nesting and rearing of their young." (Towey Report, pg. 7).

14 What is disturbing to the Petitioners and should be disturbing to Stevens County, but
15 evidently is not, is Mr. Towey's underlying message concerning the Red-necked Grebe.
16 Although not openly stated, he alludes to the opinion that given the "extensive list of water
17 bodies with confirmed nesting records..." and "that the habitat found on Loon Lake is
18 neither unique nor necessary for the continued persistence of the species", that whether
19 the birds inhabit Loon Lake in the future is irrelevant. (Towey Report, pg. 6-7). This is quite
20 evident when he further states in his report that the Red-necked Grebe can find other
21 "isolated Category 1, 2, and 3 wetlands adjacent to Loon Lake that would provide quality
22 nesting habitat..." (Towey Report, pg. 7). The Respondent's brief shares this same
23 disturbing attitude, but more directly.

24 Advocating avoidable elimination of a species from its known habitat is a terrible
25 message to send to the citizens of Stevens County and the State of Washington. If our
26 government officials condone this type of thinking, species and their habitat will disappear,
first in one lake, then in the county, then the State, until finally certain species and their

1 habitat necessary for survival are gone. This attitude is the first step to the extinction of a
2 species.

3 The Red-necked Grebe nesting and breeding areas are mapped under the
4 Washington Department of Fish and Wildlife Priority Habitats and Species and are listed
5 under "Criterion 2 – Vulnerable Aggregations". These are "species or groups of animals
6 susceptible to significant population declines, within a specific area or statewide, by virtue
7 of their inclination to aggregate." (Washington Department of Fish and Wildlife Priority
8 Habitats and Species, July 1999). In addition, the Red-necked Grebe is listed under the
9 Washington Department of Fish and Wildlife's "Species of Concern" and is protected by the
Federal Migratory Bird Act.

10 These classifications were not even mentioned in Mr. Towey's report. His report
11 specified only that the Red-necked Grebe is not considered to be Endangered, Threatened,
12 or Sensitive in Washington State, nor a Priority Habitat and Species listed species. (Towey
13 report, pg. 3). It is the information left out of his report that is so obvious and, as such,
disturbing.

14 It's worth mentioning here that to be nominated and adopted as a Habitat or Species
15 of Local Importance a habitat or species is not required to be Endangered, Threatened or
16 Sensitive, nor on the Priority Habitat and Species list for Washington State.

17 In this case, the criteria for the Red-necked Grebe to be considered as a Species of
18 Local Importance are whether or not they are of "local concern due to their population
19 status or sensitivity to habitat manipulation. All the science submitted, even Mr. Towey's,
20 acknowledges that the population status of the Red-necked Grebe is unknown and most
21 likely in decline. (Petitioners Reply Brief, attachment F; Towey Report, pg. 3). From the
22 information in the record, there is no question that the bird's habitat, the emergent Loon
Lake wetlands, has been virtually eliminated and destroyed by human intervention.

23 In his report, Mr. Towey concludes that Red-necked Grebes are a "solitary bird...".
24 (Towey report, pg. 5). This may be true at various stages of its life, but not always. For
25 instance, on page 3, under 1.1. Red-necked Grebe Biology, Mr. Towey concludes,

1 "...Washington's wintering (Board's emphasis) Red-necked Grebes are solitary." On pg. 4 of
2 his report he states that, "They are a solitary nester...". But at Loon Lake during the nesting
3 season, the birds are considered "semi-colonial" (see Petitioner's Record #20, "Birds of
4 North America", authored by Dr. Gary Nuechterlein and Bonnie Stout) because they nest in
5 the emergent wetlands and, as such, nest in a limited area and are vulnerable aggregations
6 within their nesting environment.

7 The Red-necked Grebe is a species that fits two of the three criteria given in WAC
8 365-190-030(19). Their population status is unknown (Towey report, pg. 3 & 6), but
9 believed to be declining (Petitioner's 3rd Compliance Brief, attachment 7) and their
10 sensitivity to habitat manipulation is vulnerable when their habitat is degraded and/or
11 destroyed (Towey report, pg. 3; Petitioner's 3rd Compliance Brief, attachment 9). According
12 to a scientific study conducted by Mr. Poleschook and Ms. Gumm on Loon Lake Red-necked
13 Grebes, the fledging rate was 19% in 2005, which experts acknowledge will not sustain a
14 returning population of birds.

15 Mr. Towey, in his report on the Red-necked Grebe, states that, "With natural wave-
16 action due to high winds a factor, it is likely that the Grebe prefers areas afforded maximum
17 protection from this natural disturbance (close to the shoreline). Therefore, it is likely that
18 the majority of the nesting occurs close to the shoreline areas where the existing
19 ordinances are minimizing wave-action (wave action ordinance) and disturbance from
20 development (wetland buffer requirements)." He claims this is "likely", but does not
21 reference any studies or scientific material to substantiate this claim.

22 According to the experts on both sides of the case, the Red-necked Grebe's nests are
23 susceptible to wave action. The Board finds Mr. Towey's initial statement, "With natural
24 wave-action due to high winds a factor," substantially lacking the most obvious cause of
25 wave action on Loon Lake during the nesting season - motor boats and jet skis, which is
26 mentioned in other expert recommendations frequently (Petitioner's attachment 15, DOE
letter, pg. 2, 2nd para., attachment 18, WDFW letter, pg. 1, 3rd para.). Mr. Towey finally

1 mentions waves from, "either by wind action or recreational vehicles", at the end of his
2 paragraph as something Red-necked Grebes would most likely avoid. (Page 6, 1st para.).

3 Mr. Towey also concludes "the Grebe would most likely be in the zone of protection
4 afforded in Ordinance No. 1-1989 and the buffer protection provided for in 13.10.025 of the
5 Stevens County Critical Area Ordinance."

6 The Board finds this assumption erroneous and indefensible. There is no scientific
7 study or even any observations noted to substantiate this claim. In fact, the
8 Poleschook/Gumm study indicates just the opposite. Title 13, if enforced, protects the
9 shoreline from development, but does nothing to protect the nesting birds in the water from
10 boats and jet skis. The Petitioners submitted ample and undisputed evidence that the
11 County's enforcement is, if not non-existent, lacking in many ways.

12 Ordinance No. 1-1989 requires a no-wake speed within 100 feet from shore and
13 some objects, such as anchored vessels and buoys, but does not protect the majority of the
14 nesting sites (see Mr. Poleschook nesting maps) from being damaged by boat or jet ski
15 waves on the lake-side of the nests or within the nesting areas outside the 100-foot no-
16 wave buffer (Petitioner's Reply Brief, attachment F). If Mr. Towey had read through the
17 recommendations by the WDFW and other experts in the record, as well as studied the
18 nesting maps submitted by Mr. Poleschook, he would know that waves created by boats
19 and jet skis are a documented serious threat to the Red-necked Grebe nests during the
20 nesting season and that many of the nests sit two hundred to three hundred feet away
21 from the shoreline, but still within the emergent wetlands. In addition, the no-wake
22 ordinance does not prevent the incursion of and damage to nests and emergent vegetation
23 by motorized craft from entering the emergent wetlands at no-wake speeds.

24 Mr. Towey claims there was no specific information on nest densities or nest
25 productivity for Loon Lake (Towey report, pg. 6). The record indicates otherwise. Petitioners
26 Index attachment #12 contains complete reports and maps prepared by Mr. Poleschook
and Ms. Ginger Gumm of nest locations (GPS coordinates), nesting birds and fledging
counts on three of the wetlands on Loon Lake. Red-necked Grebe experts and agency

1 personnel in their letters agree with the scientific process, which Mr. Poleschook and Ms.
2 Gumm undertook to provide accurate statistics. They followed a valid scientific process
3 recommended by WAC 365-195-905(5), such as peer review, scientific methods, logical
4 conclusions and reasonable inferences and quantitative analysis. Attachment #12 is perhaps
5 the only peer reviewed scientific study on Red-necked Grebes on Loon Lake submitted into
6 the record. It confirms that the fledging rate of 19% for nesting grebes in the emergent
7 wetlands is, according to experts, too low to sustain a breeding population of Red-necked
8 Grebes on Loon Lake.

9 In addition, Mr. Towey's report contends that "there are many isolated 1, 2, and 3
10 wetlands adjacent to Loon Lake that would provide quality nesting habitat with the isolation
11 that is attractive to the Grebe." (Towey Report, pg. 7). As previously mentioned, it is
12 evident that he completely ignored Chris Merker's letter and scientific study (Petitioners
13 Compliance Brief, attachments 15 & 16) completed by the DOE in August, 2004. In the
14 DOE's report on Loon Lake, Mr. Merker concludes, "On these two lakes, at least (Loon Lake
15 and Deer Lake), it seems that the grebes can only persist on Category 1 wetlands which are
16 in very limited supply." Mr. Towey also ignores Mr. Merker's recommendation, "A case could
17 be made that the Category 1 wetlands on these two lakes should be considered by Stevens
18 County to be Habitats of Local Importance in their Critical Areas Ordinance under the
19 Growth Management Act." (Attachment 16, pg. 4). Why, then, given this information would
20 Mr. Towey suggest in his report that Category 2 and 3 wetlands would provide quality
21 nesting habitat with the isolation attractive to the Grebe when there is no evidence the
22 grebes nest in Category 2 & 3 wetlands?

23 The Board finds the "science" submitted by the County's expert, Mr. Towey,
24 concerning the Red-necked Grebe recommendation, to be woefully inadequate and
25 narrowly defined in comparison to the overwhelming evidence submitted in support of the
26 Red-necked Grebe as a Species of Local Importance by the Petitioners.

The Loon Lake Wetlands

The Petitioners have provided evidence in the record that the Red-necked Grebe needs the emergent wetland habitat of Loon Lake to nest and hatch their young. Without the remaining wetlands, the Red-necked Grebe would disappear off Loon Lake. Much of this evidence is mentioned in the previous section under Board Discussion: Red-necked Grebe. But there is more evidence specifically concerning the wetlands in the record.

According to the Petitioners, the County cites the Stevens County Critical Areas Ordinance (Title 13) and the Stevens County Shoreline Master program as two regulations that will prevent alteration of the habitat or habitat elements, but there is no scientific evidence in the record to this effect. Both regulations fall short of sufficient protection for the red-necked Grebe and Loon Lake Wetlands, as the GMA requires.

Enforcement is a critical component of adopted regulations. The Petitioners have substantiated in the record numerous violations of the CAO and Shoreline Master Program by homeowners on Loon Lake. Stevens County has failed to respond to these violations or to the concerns of agency recommendations to protect the shoreline. Requests for buffer reductions have been granted by the County and mitigation is largely ignored, despite strongly worded protest letters written by the Washington State WDFW and the DOE. (Petitioners 3rd Compliance Brief, attachments 26-32).

The Stevens County Critical Areas Ordinance, Resolution #80-2004, uses for the most part the Washington Department of Fish and Wildlife's definition for Habitats of Local Importance, which includes "wetlands". According to the definition, "Habitats of local importance include a seasonal range or habitat element with which a given species has a primary association, and which, if altered, may reduce the likelihood that the species will maintain and reproduce over the long-term." The Red-necked Grebe requires the Loon Lake emergent wetland habitat (Category 1) to nest and raise their young (Petitioners Compliance Brief, attachment 16), thus these wetlands are habitats of local importance.

Three of Loon Lake's wetlands are Category 1, which are considered the "highest/rarest quality wetlands". (Petitioners 3rd Compliance Hearing Brief, attachment 15).

1 The wetlands, which encompass only 4% of the lake, down from approximately 25% before
2 development, are vital to retain the water-dependent wildlife, some species of fish and the
3 functions normally associated with wetlands.

4 Category 1 wetlands, as described in the Stevens County Ordinance, 1.) are very
5 valuable for a particular species; 2.) represent a high quality example of a rare wetland
6 type; 3.) are rare within a given region; or 4.) provide irreplaceable functions and values,
7 i.e. they are impossible to replace within a human lifetime, if at all. (Towey Report, pg. 4).
8 If even one of these criteria is the case, why wouldn't Stevens County do everything in their
9 power to protect these wetlands, including adopting boating restrictions to eliminate
10 motorized craft from entering the emergent wetland areas and no-wake extensions to the
11 lake side of the wetlands?

12 Stevens County has protected the landward side of the wetlands on Loon Lake by
13 fixed buffers through its Critical Areas Ordinance. These buffers do not protect the wetlands
14 from watercraft of any kind. According to Mr. Towey, the Category 1 and 2 wetlands
15 identified on Loon Lake are afforded higher setback requirements due to special provisions
16 required for lakes of statewide significance. If enforced, those requirements help protect the
17 shorelines, but not the wetlands themselves.

18 The DOE recommends creating "no-wake zones around (Board emphasis) the few
19 wetlands left on the lake (Loon Lake)." The agency also concluded that a "no-wake
20 management zone on 4% of the lake hardly seems a burden considering the benefits."
21 (Petitioners Compliance Brief, attachment 15). In the ensuing study, Mr. Merker argues, "A
22 case could be made that the Category 1 wetlands on these two lakes (Loon Lake and Deer
23 Lake) should be considered by Stevens County to be Habitats of Local Importance in their
24 Critical Areas Ordinance under the Growth Management Act." (Attachment 16, pg. 4).

25 In his report, Mr. Towey describes Ordinance No. 1-1989 as the regulation relating to
26 the safety of swimmers, boaters and water skiers, which provides for a no-wake zone when
within 100 feet of shorelines and other listed objects.

1 Mr. Towey's report assumes that the "wetland habitats exist near the shoreline in
2 shallow water and are protected by the County buffer requirements. Therefore, the
3 protection afforded the wetland habitats of Loon Lake is reasonable and adequate."

4 There is no scientific analysis, study or any statistics in the record to base this
5 assumption on. It is pure speculation and a misunderstanding of the intent of the County's
6 CAO. The CAO does nothing to protect the birds in the water or the emergent vegetation. It
7 is also speculation that Ordinance No. 1-1989 is effective in protecting even those nests
8 within the 100-foot no-wake zone. Ordinance No. 1-1989 has no restrictions on boats, jet
9 skis or other watercraft from entering the emergent wetlands even at no wake speed. This
10 ordinance is for the protection of humans, not wildlife or wetland vegetation. It is also
11 contrary to Mr. Merker's recommendation that, "We think it a wise idea to create no-wake
12 zones around the few wetlands left on the lake."

13 Mr. Towey notes that "the protection from man induced wave-action is not
14 considered under the Title 13 Ordinance." (Towey Report, pg. 7). This begs the question as
15 to how he believes the CAO buffers along the shoreline will protect the nesting sites of the
16 Red-necked Grebe, many of which are in the emergent wetlands off-shore and far outside
17 of the 100-foot no-wave restriction.

18 Mr. Towey concludes his report on the wetlands portion with a recommendation. He
19 writes:

20 "These wetlands probably stabilized the shoreline, purified water, released this
21 cool water more slowly over the hot summer season, stabilized flows, and
22 provided high quality fish and wildlife habitat (WDOE 2005). These functions
23 need to be restored, where possible, to slow the eutrophication process."

24 This recommendation should have ended after the word "restored". The Loon Lake
25 wetlands, which the Red-necked Grebe is dependent upon (Petitioners Reply Brief, pg. 5),
26 are vital to the functions listed above in the DOE letter quoted by Mr. Towey. According to
the record, 4% of Loon Lake is wetland and over 20% of this type of habitat has
disappeared over the years due to human encroachment. The shallow water bays and

1 associated emergent wetland habitat is important in Stevens County and does merit
2 protection. (Petitioners Brief, attachment 18).

3 The County has the ability to protect critical areas, including wetlands, with policies
4 and development regulations. The Respondent argued that Title 13 is a GMA development
5 regulation and, as such, does not and cannot be used to regulate recreational activities,
6 such as boating. Respondents fail to mention or argue anywhere in their brief concerning
7 this issue that the statute also includes the term "policies", which can be developed to
8 protect critical areas. [RCW 36.70A.172(1)]. Counties and cities have the ability to pass laws
9 and regulations for the health, safety and welfare of its citizens and for the protection of its
10 natural resources.

11 For instance, Spokane County regulated jet skis and certain sized motorized boats on
12 the Spokane River to protect wildlife by restricting the use of these machines along portions
13 of the river and during certain months when waterfowl were nesting and fledging. The GMA
14 does not require these types of regulations, but common sense usually does.

15 **Conclusion:**

16 The Petitioners have carried their burden of proof. By clear, cogent and convincing
17 evidence they have shown that Stevens County's denial of the nominations of the Loon Lake
18 wetland habitat as a Habitat of Local Importance and the Red-necked Grebe as a Species of
19 Local Importance is clearly erroneous in view of the entire record and is still out of
20 compliance. The Board is left with a firm and definite conviction that a mistake has been
21 committed by Stevens County.

22 **VI. FINDINGS OF FACT**

- 23 1. On July 6, 2004, Stevens County adopted Resolution #80-2004. The
24 resolution amends Title 13, the County's Critical Areas Ordinance, to
25 comply with the Final Decision and Order issued on February 10, 2004,
26 by the Eastern Washington Growth Management Hearings Board.
2. The County received nominations to designate species and/or habitat of
local importance by the Petitioners.

- 1 3. The County adopted Findings of Facts and Resolution 41-2005 on
2 March 22, 2005.
- 3 4. The County failed to provide best available science to support its denial
4 of the Red-necked Grebe as a Species of Local Importance and the
5 wetlands on Loon Lake as Habitat of Local Importance.
- 6 5. The EWGMHB issued its order of non-compliance in Case #03-1-0006c
7 on May 10, 2005.
- 8 6. The County filed a Motion for Reconsideration to which the EWGMHB
9 issued an Amended Second Order on Compliance on June 2, 2005.
- 10 7. The County, in response to the Board's Order, hired Mr. Towey,
11 Principal Ecologist with Towey Ecological Services, to prepare a report
12 based on the record to offer recommendations based on the BAS.
- 13 8. The "best available science" presented by Mr. Towey's report and
14 submitted into the record to deny the nominations falls significantly
15 short in its content, coverage and accuracy in comparison to the
16 Petitioners overwhelming scientific evidence in support of the
17 nominations of the Red-necked Grebe as a Species of Local Importance
18 and the wetlands at Loon Lake as Habitat of Local Importance.

VII. CONCLUSIONS OF LAW

- 19 1. The Petitioners have participation standing, pursuant to RCW
20 36.70A.280(2) and (4), to pursue their appeal on the issues presented
21 to the Board.
- 22 2. Counties are required to designate and protect critical areas. RCW
23 36.70A.060(2) and 36.70A.170(d).
- 24 3. The definition of "critical areas" include "fish and wildlife habitat
25 conservation areas" (FWHCA). RCW 36.70A.030(5)(c).
- 26 4. Fish and wildlife habitat conservation areas include "Habitats and
 Species of Local Importance". WAC 365-190-080(5)(a)(ii).

5. "Species of Local Importance" is defined by WAC 365-190-030(19).
6. "Habitats of Local Importance" is defined by WAC 365-190-030(9).
7. Counties "shall include best available science in developing policies and development regulations to protect the functions and values of critical areas." RCW 36.70A.172(1).
8. The Petitioners have carried their burden of proof and shown by the evidence in the record that the actions of Stevens County are clearly erroneous.

VIII. ORDER

1. The Board continues to find that Stevens County's failure to designate the Red-necked Grebe as a Species of Local Importance and the Loon Lake wetlands as a Habitat of Local Importance is clearly erroneous. By this action, the County violated the GMA and did not properly follow the requirements set forth in the GMA.
2. The Board finds Stevens County out of compliance and remands Resolution 109-2005 back to the Stevens County Board of County Commissioners to reconsider the subject nominations.
3. Stevens County must take the appropriate legislative action to bring themselves into compliance with the goals and requirements of the Act as so ordered by the Board by **February 21, 2006, 60 days** from the date issued.
4. The majority of the Board has determined that sanctions are not called for at this time, but are prepared to reconsider this action depending on the County's future actions.
5. The Presiding Officer, in light of what appears to be the continuing intentional and deliberate avoidance by Stevens County to comply with the GMA, is prepared to immediately recommend sanctions be placed

on the County by the State until such time as the County comes into compliance with the GMA.

- The County shall file with the Board by **February 28, 2006, an original and four copies** of a Statement of Actions Taken to Comply (SATC) with the GMA, as interpreted and set forth in this Order. The SATC shall attaché copies of legislation enacted in order to comply. The County shall simultaneously serve a copy of the SATC, with attachments, on the parties. By this same date, the County shall file a "Remanded Index," listing the procedures and materials considered in taking the remand action.
- By no later than **March 14, 2006**, Petitioners shall file with the Board an **original and four copies** of Comments and legal arguments on the County's SATC. Petitioners shall simultaneously serve a copy of their Comments and legal arguments on the parties.
- By no later than **March 28, 2006**, the County shall file with the Board an **original and four copies** of the County's Response to Comments and legal arguments. The County shall simultaneously serve a copy of such on the parties.
- By no later than **April 4, 2006**, Petitioners shall file with the Board an **original and four copies** of their Reply to Comments and legal arguments. Petitioners shall serve a copy of their brief on the parties.
- Pursuant to RCW 36.70A.330(1) the Board hereby schedules a telephonic Compliance Hearing for **April 11, 2006, at 10:00 a.m.** The parties will call **360-357-2903 followed by 14258 and the # sign**. Ports are reserved for Ms. Wagenman, Mr. and Mrs. Shawl, Mr. Rudisill, President Loon Lake Property Owners Association, Loon Lake Defense Fund, and Mr. Scott. If additional ports are needed please contact the Board to make arrangements.

If the County takes legislative compliance actions prior to the date set forth in this Order, it may file a motion with the Board requesting an adjustment to this compliance schedule.

Pursuant to RCW 36.70A.300 this is a final order of the Board.

1 **Reconsideration.** Pursuant to WAC 242-02-832, you have ten (10) days from the
2 mailing of this Order to file a petition for reconsideration. The original and four
3 copies of a motion for reconsideration, together with any argument in support
4 thereof, should be filed with the Board by mailing, faxing, or otherwise
5 delivering the original and four copies of the motion for reconsideration directly
6 to the Board, with a copy served on all other parties of record. **Filing means**
7 **actual receipt of the document at the Board office.** RCW 34.05.010(6), WAC 242-
8 02-240, WAC 242-02-330. The filing of a motion for reconsideration is not a
9 prerequisite for filing a petition for judicial review.

10 **Judicial Review.** Any party aggrieved by a final decision of the Board may appeal
11 the decision to superior court as provided by RCW 36.70A.300(5). Proceedings
12 for judicial review may be instituted by filing a petition in superior court
13 according to the procedures specified in chapter 34.05 RCW, Part V, Judicial
14 Review and Civil. The petition for judicial review of this Order shall be filed with
15 the appropriate court and served on the Board, the Office of the Attorney
16 General, and all parties within thirty days after service of the final order, as
17 provided in RCW 34.05.542. Service on the Board may be accomplished in person
18 or by mail. Service of the Board means **actual receipt of the document at the**
19 **Board office** within thirty (30) days after service of the final order. A petition for
20 judicial review may not be served on the Board by fax or electronic mail.

21 **Service.** This Order was served on you the day it was deposited in the United
22 States mail. RCW 34.05.010(19).

23
24 **SO ORDERED** this 21st day of December 2005.

25
26 EASTERN WASHINGTON GROWTH MANAGEMENT
HEARINGS BOARD

John Roskelley, Board Member

Judy Wall, Board Member

Dennis Dellwo, Board Member